021088 JAN 21 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICHARD LEIDER,

Petitioner,

v.

UNITED STATES OF AMERICA; UNITED STATES TREASURY DEPARTMENT and ROBERT E. RUBIN, SECRETARY OF THE TREASURY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KEVIN MCINERNEY
Counsel of Record
MCINERNEY & MCINERNEY
18124 Wedge Parkway
Suite 503
Reno, NV 89511
(775) 849-3811

MATTHEW RIGHETTI
JOHN GLUGOSKI
RIGHETTI & WYNNE
456 Montgomery St.
Suite 1400
San Francisco, CA 94104
(415) 983-0900

Attorneys for Petitioner

Balmar Legal Publishing Services, Falls Church, VA (703) 289-9000

QUESTIONS PRESENTED

1. In Order To Ensure Uniformity Under The Law, Should The Supreme Court Grant Review Of A Matter In Which Two Circuits Have Entered Decisions In Conflict With The Decisions Of Four Other Circuits.

2. Where The Government Takes the Property Of Private Citizens, Should The Government Be Responsible For The Lost Use Of That Property.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are as follows: Richard Leider, a citizen of the United States and resident of the State Of California (hereafter "Petitioner") and The United States of America, The United States Treasury Department and the Secretary of the U.S. Treasury.(hereafter "Respondents").

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF REASONS FOR GRANTING THE WRIT 5

REASONS FOR GRANTING THE WRIT 6

A. Review Is Proper and Should Be Granted Due To The Split Amongst Six Circuits Concerning Whether "Constructive Interest" Is A Recognized Property Right. 6

1. TWO CIRCUITS, INCLUDING THE CIRCUIT WHERE THIS CASE ORIGINATES, FIND CONSTRUCTIVE INTEREST TO BE A RECOGNIZABLE PROPERTY INTEREST. 7

B. THE GOVERNMENT IS RESPONSIBLE TO PROVIDE PETITIONER WITH JUST COPMPENSATION FOR THE USE OF HIS PROPERTY. 10

1. If Allowed To Stand, The Court Of Appeal Has Created An Unjust Result By Holding That The Government Is Immune From Paying "Just Compensation" When The Government Chooses Not To Place

"Taken" Property In An Interest-Bearing Account. 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **Page**

Ikelionwu v. United States, 150 F.3d 233, 238-39 (2d Cir.1998).....8

Leatherman v. Tarrant County Narcotics Intelligence and Coordiantion Unit, 507 U.S. 163 (1993).....1

Neitzke v. Willaims, 490 US 319, 328-329 (1989).....1

United States v. $7,990.00 in U.S. Currency, 170 F.3d 843, 845-46 (8th Cir.), *cert. dismissed*, 528 U.S. 1041, 120 S.Ct. 577, 145 L.Ed.2d 449 (1999).....8

United States v. $30,006.25 in U.S. Currency, 236 F.3d 610, 614 (10th Cir.2000).....8

United States v. $277,000 U.S. Currency, 69 F.3d 1491 (9th Cir.1995).....7, 9, 10

United States v. $515,060.42 in U.S. Currency, 152 F.3d 491 (6th Cir.1998).....8

Washington Legal Foundation v. Legal Foundation of Washington, Case No. 01-1325.....1

STATUTES:

11 U.S.C. §347.....4

28 U.S.C. §2041.....4

28 U.S.C. §2042.....4

No. ____

IN THE

Supreme Court of the United States

RICHARD LEIDER,

Petitioner,

v.

UNITED STATES OF AMERICA; UNITED STATES TREASURY DEPARTMENT and ROBERT E. RUBIN, SECRETARY OF THE TREASURY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit entered on August 15, 2002.

OPINIONS BELOW

This case was filed on September 29, 1998 in the United States District Court, Northern District of California. Respondents filed a Motion to dismiss pursuant to FRCP 12(b)(1) & (6). Petitioner timely opposed the motion. Without oral argument, the motion was granted on April 12, 1999 and judgment was entered against Petitioner. Petitioner's timely motion for reconsideration was also summarily denied. On May 6, 1999, Petitioner filed a timely Notice of Appeal to the Ninth Circuit. On November 17,

2000, the appeal was transferred to the United States Court of Appeals for the Federal Circuit by order of the Ninth Circuit. In January 2001, oral argument was held on this matter. On August 15, 2002, The United States Court of Appeal for the Federal Circuit affirmed the United States District Court, Northern District of California's order dismissing Petitioner's takings claim for failure to state a claim upon which relief could be granted, but upon grounds other than those set forth by the District Court. This petition for writ of certiorari is filed seeking the Court's review.

I.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Federal Circuit for which the Court's review is sought was entered on August 15, 2002. App. 1A. A petition for rehearing and a request for a rehearing en banc was denied on October 23, 2002. App. 23A The mandate issued on October 30, 2002. App. 23A The jurisdiction of the Court is invoked pursuant to Rule 10 (a) of the Rules of the Supreme Court.

II.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation."

III.

STATEMENT OF THE CASE[1]

This case relates to 'unclaimed funds' on deposit with the U.S. Treasury.[2] After a bankruptcy has been adjudicated, distributions or "dividends" are mailed to the creditors. In many instances, the check sent out by the trustee to the creditors goes undelivered or uncashed, for myriad reasons such as misaddressing the check, postal error, theft of mail, a creditor has moved and the forwarding has expired, a creditor has died or become incompetent, or, if a business has been succeeded. After ninety days, returned and/or uncashed checks are canceled and the money is deposited with the U.S. Treasury in an "unclaimed funds" account. No subsequent efforts whatsoever are made to locate the rightful owner(s) of funds. Instead, the funds are held by the United States as a trustee for the rightful owner for a period of five years, in the name and to the credit of the Bankruptcy Court. After five years, they are held in the name and to the credit of the United States. If a creditor later learns that s/he did not receive a dividend, s/he may file a petition for return of funds and the dividend is then paid. However, the money is returned to the creditor without interest.

In the instant case, Petitioner was a creditor in a bankruptcy that dragged on for nine years. During that time,

---

[1] Presently, another matter which may have bearing on the outcome of this case is pending before the U.S. Supreme Court. *Washington Legal Foundation v. Legal Foundation of Washington*, Case No. 01-1325.

[2] This statement of facts is derived from Petitioner's allegations in the Complaint. In reviewing a 12(b)(6) motion as the Court of Appeal was in this case, the Court must accept as true all material allegations in the Complaint, as well as all reasonable inferences to be drawn from them – no matter how unlikely. *Leatherman v. Tarrant County Narcotics Intelligence and Coordiantion Unit*, 507 U.S. 163 (1993). *Neitzke v. Willaims*, 490 US 319, 328-329 (1989).

he moved. When the bankruptcy was finally resolved in 1996, Petitioner never received his dividend check from the bankruptcy court for reasons unknown at the present time – and his dividend was considered "unclaimed". Some two years later, Petitioner learned of the resolution of the bankruptcy and petitioned the Bankruptcy Court for the return of his dividend. The principal amount of the dividend was returned to Petitioner, but no interest was tendered for the lengthy period that it was on deposit with the U.S. Treasury. Petitioner's scenario is typical of thousands of bankruptcy creditors.

Appellant filed a class action alleging that the United States of America, the Treasury Department, and the former Treasurer, Robert Rubin, for many years failed to return actual or constructive interest on funds deposited with the United States to such bankruptcy creditors when the principal was paid. Petitioner alleged that by severing principal from interest the Respondents violated the Fifth Amendment of the United States Constitution by an unlawful taking. Additionally, the complaint alleges that the United States breached its fiduciary duty to the Petitioner by failing to make reasonable efforts to contact him and by failing to invest the unclaimed funds in an interest bearing account. Instead, the Respondents treated such creditors' funds like a "windfall," by depositing the money into the general Treasury account without paying interest to Petitioner. The case law pertaining to unclaimed funds (11 U.S.C. §347, 28 U.S.C. §2041, and 28 U.S.C. §2042) states that the United States is a trustee, holding the funds for the rightful owners. However, the government makes no meaningful effort to contact the rightful owners, even though the United States is a trustee and certainly has the resources to easily determine the current address of virtually every creditor.

On August 15, 2002, The United States Court of Appeal for the Federal Circuit affirmed the United States District Court, Northern District of California's order dismissing

Petitioner's takings claim for failure to state a claim upon which relief could be granted. A petition for rehearing and rehearing en banc was filed and denied on October 23, 2002.

This petition is timely based upon Rule 13 of the Rules of the Supreme Court of the United States.

IV.

SUMMARY OF REASONS FOR GRANTING THE WRIT

There is presently no uniformity under the law due to the split amongst the various Circuits on the issue of whether or not constructive interest is a recognizable property right. It is unjust for constructive interest to be recognized as a compensable property interest under a Fifth Amendment Takings Claim, depending merely on the Circuit in which the case is being decided. The irony of the situation is that had this case been reviewed by the Court of Appeals for the Ninth Circuit, where this case originated, a different result would likely have occurred. This fact highlights the importance that there be uniformity under the law.[3] In the Ninth Circuit, constructive interest is a recognized property interest and therefore sufficient to establish a claim under the Taking Clause; however, the Federal Circuit in this case, found that Petitioner failed to establish a property right because constructive interest does not constitute a property interest under the law of the Federal Circuit.[4] App.11-12A. Review

---

[3] This matter was transferred to The Court of Appeals for the Federal Circuit as The Federal Circuit has appellate jurisdiction over cases arising under the Little Tucker Act.

[4] The District Court's decision to grant the motion to dismiss was based on a different rationale entirely. The District Court misunderstood Appellant's claim to be that the taking occurred at the time of deposit of the funds into the Treasury. Appellant alleged that the taking occurred when interest was separated from principal upon the return of the funds to

is warranted in this case in order to mend the split amongst the Circuits and preserve uniformity under the law. The Ninth and Sixth Circuits hold that constructive interest is a property interest, while the Second, Eight, Tenth Circuits (and now the Federal Circuit) hold the opposite.

Further, the law provides, that under the Fifth Amendment of the United States Constitution, private property shall not "be taken for public use, without just compensation." The decision of the Court of Appeal in this case, finding against constructive interest as a recognizable property interest, has carved out an unfair exception to the "just compensation" requirement. Based on the Court of Appeal's ruling, the Government is not required to pay "just compensation" to private citizens for the "lost use value" of property depending merely on how that property was used by the Government. When such property is not placed in an interest-bearing account then no taking occurs even though the property is indisputably being beneficially used by the Government. Further, from the standpoint of the rightful owner of the property, s/he is being denied the use value of the property no matter how that property was handled by the Government. Petitioner contends that the exception created by distinguishing a taking based upon whether or not the money was deposited into an interest bearing account undermines the very foundation of the Fifth Amendment and is contrary to the intent of the drafters of the Constitution.

V.

REASONS FOR GRANTING THE WRIT

A. Review Is Proper and Should Be Granted Due To The Split Amongst Six Circuits Concerning Whether

---

Appellant. Further, the District Court found Appellant to be negligent; however, there was nothing in the pleadings to substantiate this finding.

"Constructive Interest" Is A Recognized Property Right.

Rule 10 (a) of The Rules of The Supreme Court provides in pertinent part,

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another court of appeals on the same important matter; ...

1. TWO CIRCUITS, INCLUDING THE CIRCUIT WHERE THIS CASE ORIGINATES, FIND CONSTRUCTIVE INTEREST TO BE A RECOGNIZABLE PROPERTY INTEREST.

The District Court granted Petitioner's Motion to Dismiss on the grounds that 1) the depositing of the funds by the government into the Treasury did not constitute a taking under the Fifth Amendment, and 2) Petitioner was negligent in the manner in which he recovered his funds from the government.[5] App.20-21A. The District Court never found that Appellant failed to establish a property right. To do so would be contrary to the law set forth by the Ninth Circuit in *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir.1995). Surprisingly, the Court of Appeal for the Federal Circuit affirmed the District Court's decision on the basis that constructive interest is not a recognized property interest and,

---

[5] Petitioner actually alleged that the taking took place at the time the funds were returned to him because interest was separated from principal. Further, there was nothing in the Complaint or record to indicate Petitioner had been negligent in recovering his funds. A true and correct copy of the District Court's opinion is attached to the appendix hereto.

therefore, Petitioner never established a property right for which relief could be granted. App. 11-12A.

The laws of the various Circuits are uniform as to the underlying principle that in order for there to be a taking under the Fifth Amendment, there must be a recognized property interest at issue; however, the Circuits are not united on the issue of what exactly constitutes a property interest.

The issue of whether constructive interest is a recognized property interest has been addressed by numerous courts and has resulted in a split amongst the various circuits. Four circuits (the Second, Eighth, Tenth and the Federal Circuit, as evidenced by its ruling in this case) do not recognize constructive interest as a property interest and accordingly denied any claim for constructive interest. See *United States v. $30,006.25 in U.S. Currency,* 236 F.3d 610, 614 (10th Cir.2000); *United States v. $7,990.00 in U.S. Currency,* 170 F.3d 843, 845-46 (8th Cir.), *cert. dismissed,* 528 U.S. 1041, 120 S.Ct. 577(1999); *Ikelionwu v. United States,* 150 F.3d 233, 238-39 (2d Cir.1998).

Two other circuits disagree. Those Circuits are the Ninth Circuit, where this case originates, and the Sixth Circuit. In *United States v. $277,000 U.S. Currency,* 69 F.3d 1491 (9th Cir.1995), the Ninth Circuit reasoned that even where the money did not actually earn interest, the government should be liable for the interest the money would have earned, had the government placed it in an interest-bearing account. "Moreover, the court concluded that in a sense, money held by the government always "constructively" earns interest, since "all financial assets in the hands of the government are a means by which the government does not have to borrow equivalent funds." *Id.* at 1495. The Sixth Circuit concurred with this view, in *United States v. $515,060.42 in U.S. Currency,* 152 F.3d 491 (6th Cir.1998) leaving a split amongst the Circuits.

As set forth above, the question of whether constructive interest is a recognized property interest is of such grave

importance that at least five Circuits, prior to this case, have found it necessary to render published decisions as to their respective Circuit's opinion on the issue. The Federal Circuit now appears to have weighed in on the issue by refusing to recognize constructive interest as a valid property right as evidenced by the opinion of the Court of Appeal.

> Mr. Leider has not pointed to any authority supporting the proposition that interest that was never earned may establish a property right for purposes of the Fifth Amendment that is separate and apart from the right to the underlying principal." Decision of Court of Appeal, Federal Circuit App.11A

Petitioner did cite to *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir.1995) in support of his position that constructive interest is a recognized property interest; however, the Court of Appeal did not find that case to be binding on the Federal Circuit. It appears the District Court correctly determined that a property right had been established per clear Ninth Circuit Law. Rather, the focus of the District Court's analysis was that the depositing of the funds in the Treasury was not a taking.

Contrary to the District Court's conclusion, Petitioner had alleged that the taking occurred at the time of the separation of interest from principal rather than the depositing of the funds in the Treasury. The District Court erroneously believed Petitioner was alleging the taking occurred when the funds were deposited in the Treasury and thus granted the motion to dismiss.[6] It was this ruling that led Petitioner to seek review from the Court of Appeal.

---

[6] The Court also found Appellant to be negligent in recovering his funds but there was nothing in the pleadings or the record to indicate such was the case. Further, the Court of Appeal made no such finding that Appellant was negligent.

But for a specific rule of law that requires all appeals of claims involving the Little-Tucker Act to be heard by the Federal Circuit, the District Court's decision would have been reviewed by the Court of Appeal for the Ninth Circuit. This is an important point because the Ninth Circuit recognizes constructive interest as a property interest. Vesting appellate jurisdiction of this case in the Federal Circuit turned out to be dispositive because the Federal Circuit decided not follow Ninth Circuit precedent (ironically, the precedent that guided the District Court's decision).

Of course, there should be uniformity amongst the Circuits. There is a strong public policy in ensuring uniformity under the law. Had the Court of Appeal Applied Ninth Circuit law, a different result would have been reached i.e., that constructive interest is a recognized property right. Thus the District Court's granting of the motion to dismiss would have been held improper because the facts necessary to state a takings claim under the Fifth Amendment would have been properly plead. Review is necessary to ensure consistency in the law as opposed to the anomaly created when a similar matter is decided in the Ninth and/or Sixth Circuit versus the Second, Eighth, Tenth or Federal Circuit.

B. THE GOVERNMENT IS RESPONSIBLE TO PROVIDE PETITIONER WITH JUST COPMPENSATION FOR THE USE OF HIS PROPERTY.

1. If Allowed To Stand, The Court Of Appeal Has Created An Unjust Result By Holding That The Government Is Immune From Paying "Just Compensation" When The Government Chooses Not To Place "Taken" Property In An Interest-Bearing Account.

It is indisputable that property shall not be taken for public use without just compensation. In *United States v. $277,000 U.S. Currency,* 69 F.3d 1491 (9th Cir.1995), the Ninth Circuit reasoned that the government should be liable

for the interest the money would have earned, had the government placed it in an interest-bearing account. The Ninth Circuit further stated that "money held by the government always 'constructively' earns interest, since "all financial assets in the hands of the government are a means by which the government does not have to borrow equivalent funds." *Id.* at 1495. And, looked at from the perspective of the Petitioner, he loses value when deprived of his property regardless of how the government handles his principal. The Court of Appeal decision fails to logically address either the unjust enrichment conferred on the Government, or Petitioner's lost use of his property. The Government had **free** use of Petitioner's property, which it used for its own benefit, without paying Petitioner the "just compensation" owed under the law.

Granting this petition is warranted. Otherwise, the Court of Appeal has created a **loophole** for the Government to avoid having to pay "just compensation" for using the property of private citizens. To circumvent the "just compensation" requirement of the Fifth Amendment, the Government could do anything with the money but place it in an interest bearing account.. Such an exception to the rule defeats all logic and all sense of fairness. It was not lost on the Ninth Circuit that "money held by the government always 'constructively' earns interest." While the Government was in possession of the taken property, the Government used the property to offset its needs "to borrow equivalent funds." Simultaneously, Petitioner was deprived of the use of his property, deprived of the ability to earn interest on said property, and now deprived "just compensation" for the lost use of the property. To deny Petitioner his right to "just compensation" based on the anomalous circumstance that the money was not placed in an interest-bearing account by the Government leads to unjust enrichment for the Government and an unjust result for Petitioner and those similarly situated.

VI.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari in order to address this important Constitutional issue.

Respectfully submitted,

KEVIN MCINERNEY
Counsel of Record
MCINERNEY & MCINERNEY
18124 Wedge Parkway
Suite 503
Reno, NV 89511
(775) 849-3811

MATTHEW RIGHETTI
JOHN GLUGOSKI
RIGHETTI & WYNNE
456 Montgomery St.
Suite 1400
San Francisco, CA 94104
(415) 983-0900

Attorneys for Petitioner

Dated: January 22, 2003

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-1097

RICHARD LEIDER,
Plaintiff-Appellant,

v.

UNITED STATES, UNITED STATES TREASURY DEPARTMENT, and PAUL H. O'NEILL, SECRETARY OF THE TREASURY,
Defendants-Appellees.

John Glugoski, Righetti & Wynne, of San Francisco, California, argued for plaintiff-appellant. On the brief was Matthew Righetti.

Katherine M. Kelly, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendants-appellees. With him on the brief were Stuart E. Schiffer, Acting Assistant Attorney General; David M. Cohen, Director; and Mark A. Melnick, Assistant Director. Of Counsel on the brief was Marc I. Seldin, Senior Attorney, Financial Management Service, Department of Treasury, of Washington, DC.

Appealed from: United States District Court for the Northern District of California

Judge Maxine M. Chesney

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

01-1097

RICHARD LEIDER,
Plaintiff-Appellant,

v.

UNITED STATES, UNITED STATES TREASURY DEPARTMENT, and PAUL H. O'NEILL, SECRETARY OF THE TREASURY,
Defendants-Appellees.

DECIDED: August 15, 2002

Before SCHALL, BRYSON, and DYK, Circuit Judges.

SCHALL, Circuit Judge.

Richard Leider brings this case to us from the United States District Court for the Northern District of California. Mr. Leider brought suit in the district court seeking compensation from the United States under the Fifth Amendment to the Constitution for the alleged taking by the government of interest accumulated in a bankruptcy creditor account. The district court granted the government's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. See Leider v. United States, No. C-98-3766 MMC (N.D. Cal. 1999) (Order Granting Defendant's Motion to Dismiss). Because we conclude that Mr. Leider has failed to assert the taking of a cognizable property interest, we affirm.

BACKGROUND

I.

The pertinent facts are alleged in Mr. Leider's complaint. For purposes of this appeal, we assume the well-pled allegations in the complaint to be true and draw all reasonable inferences in Mr. Leider's favor. See Roedler v. Dep't of Energy, 225 F.3d 1347, 1354 (Fed. Cir. 2001), cert. Denied, 122 S. Ct. 648 (2001); Highland Falls-Fort Montgomery Cent. Sch. Dist. V. United States, 48 F.3d 1166, 1169-70 (Fed. Cir. 1995).

In July of 1987, Milton Righetti filed a petition under Chapter 11 of the Bankruptcy Code, see 11 U.S.C. § 301 (1982), in the United States Bankruptcy Court for the Northern District of California. Complaint ¶ 9. In September of that year, his wife, Hope Righetti, also filed a Chapter 11 petition in the Northern District. Id. Mr. Leider, who was an unsecured creditor of the Righettis, filed a claim for $25,000 in the proceedings. Id.

In March of 1996, the bankruptcy court entered a final decree and order closing the case. Complaint ¶ 10. At that time, the funds on had were distributed to the Righettis' creditors pursuant to an order of the bankruptcy court. However, due to a change of address, Mr. Leider did not receive his distributive share of $2,162.67 from the proceeds of the Righetti bankruptcy estate. Mr. Leider alleges that he was unaware of the termination of the Righetti bankruptcy proceedings or the distribution of the funds. Complaint, ¶¶ 10-11.

In a bankruptcy proceeding, after 90 days have elapsed from the time funds are distributed to creditors, any checks to creditors that have not been cashed are canceled and the funds represented by the checks are "paid into the [bankruptcy] court." 11 U.S.C. § 347(a) (2000). All such funds received by the bankruptcy court are deposited with the Treasurer of the United States or a designated depositary, in the name and

to the credit of [the] court." 28 U.S.C. § 2041 (2000). After five years, any funds that are still unclaimed are deposited bye the bankruptcy court in the United States Treasury "in the name and to the credit of the United States." 28 U.S.C. § 2042 (2000). Thereafter, a creditor entitled to any of the funds may file a claim with the bankruptcy court, and if the claim is approved, the Treasury Department issues a check to the creditor in the principal amount of his or her distributive share. Id.

In this case, after the 90-day period had passed, John T. Kendall, the trustee in the Righetti bankruptcy proceedings, transferred the funds that remained unclaimed, including those owed to Mr. Leider, to the clerk of the bankruptcy court for deposit with the United States Treasury pending creditors filing petitions claiming their distributive shares. Complaint at ¶ 10. Approximately two years later, after learning of the resolution of the Righettis' bankruptcy action, Mr. Leider petitioned the bankruptcy court for the payment of his distributive share of the estate. In due course, he received from the court the sum of $2, 162.67, without interest. Id.

II.

On September 29, 1998, Mr. Leider filed a class action suit in the United States District Court for the Northern District of California against the United States, the Treasury Department, and former Treasury Secretary Robert Rubin, alleging, inter alia, that the government's failure to pay interest on his distributive share of the unclaimed bankruptcy funds constituted a taking of property under the Fifth Amendment.

In due course, the defendants moved to dismiss Mr. Leider's complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted, pursuant to Rules 12(b)(1) and 12 (b)(6), respectively, of the Federal Rules of Civil Procedure. In an April 12, 1999 Order, the district court denied the defendants' motion to dismiss for lack of jurisdiction. The court held that it had jurisdiction

under the Little Tucker Act, 28 U.S.C. 1346(a)(2) (1994), because Mr. Leider, the only plaintiff in the as yet uncertified class, had filed a claim for interest on his distributive share of the bankruptcy proceeds that did not exceed $10,000. Leider, slip. Op. at 2.[1]

At the same time, however, the district court ruled that Mr. Leider had failed to state a viable takings claim under the Fifth Amendment. It therefore granted the motion to dismiss under Rule 12(b)(6). The court determined that the statutes mandating the deposit of unclaimed bankruptcy funds into a Treasury account expressly permitted creditors to request and receive their distributive shares at any time. Accordingly the court reasoned, the government merely "possessed" Mr. Leider's $2,162.67 share, which, as a matter of law, did not constitute a "taking" without compensation in violation of the Fifth Amendment. Leider, slip. Op. at 5-6. The district court viewed the government's possession of Mr. Leider's funds as resulting not from a compensable taking, but from Mr. Leider's own inaction. As for interest on the funds that the government had in its possession, the court declined to find that "the United States committed an unconstitutional taking by failing to pay interest on unclaimed funds that it was obligated by statute to hold for plaintiff due to his own negligence." Id. Finally, while the district court noted that Mr. Leider did not "separately plead a cause of action for breach of fiduciary duty" in support of his claim that interest was taken from him, it ruled that such an alternative basis for recovery was "without merit." Id., slip. op. at 4 n.2.

Mr. Leider appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. That court sua sponte requested briefing on the question of whether it properly could assert jurisdiction over Mr. Leider's appeal in the light of the Supreme Courts decision in United States v. Hohri, 482

---

[1] Though Mr. Leider filed his complaint as a class action, the district court adjucated the dispositive Rule 12 motions before considering the question of class certifications. See Leider, slip. Op. at 2.

U.S. 64 (1987),[2] and the Congressional grant o jurisdiction to this court in 28 U.S.C. § 1295(a)(2) (1994). Thereafter, on November 17, 2000, the Ninth Circuit held that it lacked jurisdiction and ordered a transfer of Mr. Leider's appeal to this court.

DISCUSSION

I.

The Little Tucker Act confers concurrent jurisdiction upon the court of Federal Claims and the appropriate United States district court for a "civil action or claim against the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). We have exclusive jurisdiction, pursuant to 28 U.S.C. § 1295(a)(2), to review decisions "based, in whole or in part," on the Little Tucker Act. Rothe Dev. Corp. v. United States DOD, 262 F.3d 1306, 1316 (Fed. Cir. 2001).

II.

Dismissal for failure to state a claim under Rule 12(b)(6) is proper only when a plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-56 (1957). As indicated above, in reviewing the grant of a Rule 12(b)(6) motion, we assume all well-plead factual allegations in the complaint to be true and draw all reasonable inferences in the plaintiffs favor. Whether the district court properly dismissed Mr. Leider's complaint for failure to state a claim upon which relief could be granted is a question of law, which we review de novo. Boyle v. United States, 200 F.3d 1369, 1372 (Fed. Cir. 2000).

---

[2] In Hohri, 482 U.S. at 75-76, the Supreme Court held that this court has exclusive jurisdiction over "mixed" cases in which the district court's jurisdiction was based in part on the Little Tucker Act.

The Fifth Amendment provides, in pertinent part, as follows: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V, cl. 4. In evaluating a takings claim, we first consider whether the plaintiff has identified a property interest cognizable under the Fifth Amendment. See M & J Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995). If the plaintiff satisfies the prerequisite of identifying a cognizable property interest, which we have labeled a "bedrock requirement," Wyatt v. United States, 271 F.3d 1090, 1097 (Fed. Cir. 2001), cert. denied, I. Minerals Int'l, Inc. v. United States, 122 S. Ct. 1960 (2002), we proceed to consider whether the governmental action at issue constituted a taking of that property interest. M & J Coal, 47 F.3d at 1154; Karuk Tribe of Cal. V. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000).

In an attempt to satisfy the threshold requirement of a property interest, Mr. Leider asserts that the statutes pursuant to which the bankruptcy court deposited in the Treasury unclaimed funds from the Righetti bankruptcy proceedings conferred upon him a right to interest on his share of the funds.[3] We disagree. As we explain below, the deposited funds did not earn interest, and the relevant statutory framework does not impose an obligation on the government to earn and disburse interest to unlocated creditors such as Mr. Leider. Because Mr. Leider cannot assert a property right in interest that never came into existence, there is no way he can assert a viable taking claim under the Fifth Amendment.

III.

Mr. Leider argues that, by operation of the statutes pursuant to which his distributive share of the bankruptcy proceeds was deposited in the Treasury, he was vested with a compensable property interest. The statute that governs the

---

[3] Mr. Leider does not assert that his distributive share of the Righetti bankruptcy estate ($2,162.67) which was paid to him, was the subject of an uncompensated taking.

processing of unclaimed bankruptcy funds states in pertinent part:

> Ninety days after the final distribution...the trustee shall stop payment on any check remaining unpaid, and any remaining property of the estate shall be paid into the court and disposed of under chapter 129 of Title 28.

11 U.S.C. § 347(a) (1994). The relevant part of chapter 129 of Title 28, in turn, provides as follows:

> All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.
>
> This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

28 U.S.C. § 2041.[4] "Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him." 28 U.S.C. § 21042 (2000).

Based on this statutory scheme, which mandates the deposit of an unlocated creditor's funds in a Treasury account until the creditor petitions the court for payment, Mr. Leider

---

[4] As noted above, after remaining in the Treasury account "in the name and to the credit of [t]he court" pursuant to section 2041 for five years, the funds are deposited in the Treasury "in the name and to the credit of the United States." 28 U.S.C. § 2042 (2000). Since Mr. Leider received his distributive share of the bankruptcy proceeds less than five years after they were deposited, the transfer of the funds to "the name and to the credit of the United States," pursuant to section 2042 did not occur. We therefore have no occasion to consider the implications of that provision.

argues that he enjoys a property interest in the funds and that the "interest follows principal" rule creates a similarly compensable right to interest on the funds. Under the common law rule that "interest shall follow principal, as the shadow the body," Beckford v. Tobin, 1 Ves. 308, 310, 27 Eng. Rep. 1049, 1051 (Ch.1749), the interest on funds "follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980).

We agree with Mr. Leider that an unlocated creditor has a property right in his or her distributive share of the funds of a bankruptcy estate. We do not agree, however, that the "interest follows principal" rule applies in this case so as to establish for Mr. Leider a property right to interest on his distributive share of the funds from the Righetti bankruptcy. The reason that interest was never earned on the funds. Hence, there was no interest to follow principal.

Mr. Leider relies mainly upon Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998). That case involved the State of Texas's requirement that interest earned on money that was paid by clients to attorneys and then was placed in interest bearing accounts be remitted to the Texas Equal Access to Justice Foundation. The Supreme Court was called on to address whether interest earned on money in the accounts was a property right that could support a claim that the Texas requirement constituted a taking of the interest under the Fifth Amendment. Relying on the long-established rule that "interest follows principal," the Court held that the interest indeed constituted a property right. Id. at 165-67. Simply put "a state by ipse dixit, may not transform private property into public property without compensation' [and] sidesteps the Takings Clause by disavowing traditional property interests long recognized under state law." Id. at 167 (quoting Webb's Fabulous Pharmacies, 449 U.S. at 164.) Phillips supports the proposition that to the extent a claimant possesses a property interest in a particular fund, that claimant

also possesses a property right to the interest accruing from the fund.[5] However, such a role does not apply to the present circumstances, where interest never was generated. According to Mr. Leider's own complaint, "Defendants... make no effort to properly protect the principal of the unclaimed funds by investing it is interest bearing accounts." In short, because there existed no interest, there was nothing that could be taken. Accordingly, the transformation of "private property into public property without compensation" to which the Supreme Court referred in Phillips never occurred.

Also inapposite is the additional case the Mr. Leider cites for the proposition that a property interest was created in interest on the deposited funds by reason of the "interest follows principal" rule. In Schneider v. California Department of Corrections, 151 F.3d 1194 (9th Cir. 1998), the Ninth Circuit considered whether the California Department of Corrections' policy of withholding from prisoners the interest earned on their inmate trust accounts ("ITAs") constituted a taking under the Fifth Amendment. Under California law, an inmate in a state institution was required to maintain an ITA in order to purchase items in the prison canteen. However, California law also prohibited the inmate from collecting any interest earned on funds in his ITA. Id. at 1196. A group of inmates brought suit in federal district court arguing that California's policy of not paying interest generated by funds in ITAs, constituted a taking of private property in violation of the takings clause of the Fifth Amendment. Id. Concluding that the inmates did not have a protected property interest in interest earned by funds in their ITA accounts, the district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim

---

[5] Recently, in United States Shoe Corp v. United States, 2002 U.S. App. LEXIS 14776 (Fed. Cir. July 23, 2002), we stated that "[f]or the accrued interest to rise to the level of private property, principal must be held in an identical private account."

upon which relief could be granted. The court also denied the inmates' leave to file a motion to amend their complaint. Id.

On appeal, the Ninth Circuit assumed, as had the district court, that the funds in the ITA accounts had earned interest, a point that was not certain. With that assumption in hand, the court ruled that the district court had erred in dismissing the inmates' complaint. In so ruling, the court relied on the " interest follows principal" rule. The court stated: "[t]he district court erred insofar as it concluded that "inmates in California do no have a protected property interest in the interest earned on [ITAs]' and [insofar as it] dismissed the prisoners' complaint without leave to amend on the basis." Id. at 1201. The Ninth Circuit remanded the case to the district court, instructing the court to "permit discovery to determine whether or not interest actually accrues on the prisoners' ITA funds." Id. In the event the district court determined that interest was earned on the funds, it was to permit the inmates to amend their complaint so that they could proceed with their takings claim. Id. What distinguishes Schneider from Mr. Leider's case is the fact that here no interest was earned, whereas in Schneider, it was assumed that interest was earned and the case was to proceed further only if it was determined on remand that interest was in fact earned. Mr. Leider had not pointed to any authority supporting the proposition that interest that was never earned my establish a property right for purposes of the Fifth Amendment that is separate and apart from the right to the underlying principal.[6] Under these circumstances, Mr. Leider is unable to establish "a property

---

[6] United States v. $277,000 U.S. Currency, 69 F.3d 1491 (9th Cir. 1995) does not help Mr. Leider. In that case, the Ninth Circuit required the government to pay constructive interest to compensate for its improper seizure of $277, 000 and the subsequent deposit of that money in a non-interest bearing Treasury account. The court in that case considered the amount of just compensation after concluding that a taking had occurred, which is irrelevant to the distinct question, presented by Mr. Leider on appeal, of whether interest that was never earned may satisfy the threshold property interest requirement.

interest entitled to protection." Webb's Fabulous Pharmacies, 449 U.S. at 161.

IV.

Alternatively, Mr. Leider argues that the government was holding the unclaimed funds for the rightful owners as required by statute, which action created a trustee relationship and a right to interest on the fund, irrespective of whether such interest actually was earned. Accordingly to Mr. Leider, by its failure to invest the funds in accordance with its duty as a statutory trustee, the government breached a fiduciary obligation and improperly took, without compensation, interest that it had a duty to generate.

The short answer to this argument is that the government was no under a fiduciary obligation to invest the unlocated creditors' funds to generate interest, thereby creating a properly interest.[7] The plain language of 28 U.S.C. § 2041 – the statute under which Mr. Leider's funds were deposited "in the name and to the credit of [the] court"- does not impose an express duty on the government to earn interest on the deposited funds, as a fiduciary, a trustee, or otherwise.[8] The cases on which Mr. Leider relies, In re Searles, 166 F.2d 475 (2d. Cir. 1948), and United States v. Klein, 106 F.2d 213 (3d. Cir. 1939), stand for the proposition that the government may act as a statutory trustee where, as in the current version of 28 U.S.C. § 2042, after five years unclaimed bankruptcy funds are deposited, without a beneficial interest indicated, in the Treasury "in the name and to the credit of the United States." However, neither those cases nor any other authority suggest that there is an affirmative duty on the government to earn

---

[7] Because we conclude that no fiduciary duty arose in this case, we need not address the issue of whether, if such a duty excited, it would have encompassed the obligation to generate interest.

[8] The establishment of a common law trust requires three elements: a trustee, a beneficiary, and a trust corpus. United States v. Mitchell, 463 U.S. 206, 225 (1983).

interest on funds deposited under 28 U.S.C. § 2041, the statute at issue in this case.[9]

That silence is fatal to the argument that section 2041 imposes a fiduciary trustee obligation on the government to invest unlocated creditors' funds productively or to pay constructive interest to unlocated creditors. In the United States v. Louisiana, 446 U.S. 253 (1980), the Supreme Court considered a claim by the State of Louisiana that the federal government's failure to invest funds it held in trust pursuant to an agreement constituted a breach of it duty as a trustee. After noting that '[t]he agreement contains no express provision for the payment of interest or for the use of the funds or for investment" and the rule that "in the absence of specific provision by contract or statute, or express consent... by Congress, interest does not fun on a claim against the United States," the Court held that "[i]t follows that the same is true as to any claim of duty to invest,' Id. at 264-65 (internal quotations omitted). Section 2041 contains no reference to any obligation to earn interest on unlocated creditors' funds. Neither does the statute refer to the creation of a fiduciary duty in connection with interest. Consequently, the statute cannot support the claim that the government breached a duty to earn, or pay, interest on the funds of unlocated creditors in the Righetti bankruptcy proceedings.[10]

---

[9] As seen above, section 2041 provides for the deposit of unclaimed funds "in the name and to the credit of [the] court.' 28 U.S.C. § 2041. In other words, the statute does no provide for the government's general ownership of the unclaimed bankruptcy funds, but instead mandates the funds' deposit with the bankruptcy court.

[10] Mr. Leider argues that he should be granted leave to amend his complaint, ostensibly to include a claim for breach of fiduciary duty independent of his takings claim, even though he did not make such a request in the district court. However, in light of our agreement with the district court that the undisputed facts of this case do no support either a takings claim or a claim for breach of fiduciary duty, permitting Mr. Leider leave to amend would be futile. Accordingly, the district court did not err, in dismissing Mr. Leider's complaint without first granting leave

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the Northern District of California dismissing Mr. Leider's takings claim for failure to state a claim upon which relief could be granted is

AFFIRMED

---

to amend. See Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD LEIDER,
Plaintiff,

v.

THE UNITED STATES, THE UNITED STATES TREASURY DEPARTMENT, and

Decided and Filed
April 12, 1999

No. C-98-3766 MMC

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STAT A CLAIM UPON WHICH RELIEF CAN BE GRANTED

INTRODUCTION

Defendants have moved, pursuant to Federal Rules of Civil Procedure[1] 12(b)(1) and 12(b)(6), for an order dismissing this action for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted. Defendants also seek in the alternative, pursuant to Rule 12(f), and order striking from plaintiff's complaint, pleased as a class action, alleges that the defendants have committed an unlawful taking to failing to pay interest on unclaimed funds deposited in the Treasury Department's general fund following a bankruptcy proceeding. Plaintiff seeks both money damages and equitable relief. The Court, finding the matter appropriate for determination based on the papers submitted in the support of and in opposition to the motion, hereby VACATES the hearing scheduled for April 9, 1999.

---

[1] Unless otherwise stated, all references to rules are to the Federal Rules of Civil Procedure.

FACTS

The facts are not in dispute. Plaintiff was unsecured creditor in a bankruptcy action and file a claim for $25,000 (Complaint ¶ 9-18). The bankruptcy court determined that plaintiff's distributive share was $2,162.67. Id. Plaintiff failed to receive his distributive share because of and address change. Id. After 90 days from the date of distribution, uncashed checks are canceled and deposited with the bankruptcy court. Id. All unclaimed funds are then deposited with the Treasury Department or designated depository pursuant to 28 U.S.C. § 2041. Unclaimed funds so deposited with the Treasury are held for a period of five years for the benefit of the claimant before escheating to the government. 28 U.S.C. § 2042. The claimant entitled to such money on deposit with the Treasury, upon proof of right there to and order of the court, may receive such unclaimed funds. Id. Plaintiff's unclaimed funds were held in the Treasury's general, no interest bearing, fund. (Comp. ¶ 18.) Upon a claim against the government for the unclaimed funds, the Treasury issues a check for the principle amount of the distribution without interest. (Comp. ¶ 16.)

DISCUSSION

A. SUBJECT MATTER JURISDICTION

The Little Tucker Act provides relevant part: "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:... Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded... upon the Constitution." 28 U.S.C. § 1346(a)(2). A Fifth Amendment taking claim arises under the Constitution, and, this, jurisdiction is appropriate in the district court over such claim to the extent that the amount sought in damages is less than $10, 000. Lenoir v. Porters Creek Watershed District, 586 F.2d 1081, 1088 (6th Cir. 1977). Where a claim is for more than $10,000, exclusive jurisdiction lies in the Court of Claims. Id.

Defendants concede that for the purposes of determining jurisdiction, the damages sought by each class member are not aggregated, but argue that those class members with claims exceeding $10,000 are not properly before the Court and must be dismissed for lack of subject matter jurisdiction. (Reply at 2.) Because the class has yet to be certified, defendants' argument is premature. Only the names plaintiff is currently before this Court. The amount upon which interest is claimed by plaintiff is $2,162.67. Defendants do no claim that plaintiff seeks interest in excess of $10,000 individually. Thus, the Court has jurisdiction over plaintiff's claim.

B. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A motion to dismiss under Rule 12(b)(6) cannot be granted unless "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). In analyzing whether to grant a Rule 12 (b)(6) motion, the court should keep in mind that dismissal is disfavored and should be granted only in "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. Hal Roach Studios, Inc. V Richard Feiner And Co., Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). However, material which is properly submitted as part of the complaint, and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered. Brach v. Tunnell, 14 F.3d 449, 454 (9th Circ. 1994). Finally, the Court may take judicial notice of matters of pubic record. Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

In analyzing a motion to dismiss, the Court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. NL Industries, Inc. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, factual allegations can be disregarded if contradicted by facts established by reference to documents attached as exhibits to the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267, (9th Cir. 1987). Conclusory allegations, unsupported by the facts alleged, need not be accepted as true. Holden v. Hagopian, 978 F.2d 1115, 1121, (9th Cir. 1992).

Plaintiff seeks monetary damages, and equitable relief in the form of an injunction and in the nature of mandamus. (Comp. ¶¶ 36-42) Defendants contend that plaintiff cannot properly seek equitable relief when brining and action pursuant to 28 U.S.C. § 1346 (a)(2). Defendants are correct. The Supreme Court has stated: "Equitable relief is not available to enjoin an alleged taking of private property... when suite for compensation can be brought against the sovereign subsequent to the taking. Generally and individual claiming that the United States has taken property can seek just compensation under the Tucker Act." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984); see also Bay View, Inc. v. Ahtna, Inc., 105 F.3d 1281, 1286, fn. 6 (9th Cir. 1997) ("neither injunctive or declaratory relief is available for a takings claim against the United States"). Simply stated, where a suite for post-deprivation damages can be maintained, equitable relief is not allowed. Clouser v. Espy, 42 F.3d 1522, 1539 (9th Cir. 1994). A suit for money damages can be brought under the Tucker Act for an unlawful taking. Id. Thus, plaintiff cannot state a claim for equitable relief as a matter of law.

Plaintiff's claim for monetary damages is premised on the argument that the defendants' diversion of unclaimed funds into the Treasury's non-interest bearing general fund, "rather than earning interest for the [p]laintiff... would reduce the amount of monies the United States against the Treasury."

(Comp. ¶ 33.) Plaintiff contends that the Treasury's failure to pay wither actual or constructive interest on the unclaimed funds used by the Treasury, instead of borrowing the money, constituted not only "a breach of the [d]efendants' fiduciary duties[2] to the plaintiff.... But also constituted an unlawful taking without just compensation." Id.

With regard to the takings allegation, defendants first argue that plaintiff cannot state a cause of action seeking interest against the government as a matter law, relying on the doctrine of sovereign immunity. (Mot. at 7.) Defendants' contention is incorrect. Although the Supreme Court noted in Library of Congress v. Shaw, 478 U.S. 310, 317 (1986), that in the absence of a constitutional requirement, statute, contract or express consent of Congress, interest is not recoverable against the United States, the "constitutional requirement arises in a taking under the Fifth Amendment." Id. at fn. 5. In order to "satisfy the constitutional mandate, just compensation includes a payment for interest." Id.

---

[2] Plaintiff does not separately plead a cause of action for breach of fiduciary duty, but, rather, refers to such breach under plaintiff's cause of action for unlawful taking. To the extent that plaintiff argues that the government breached its fiduciary duty by failing to invest his unclaimed funds, plaintiff's argument is without merit. In Fors v. United States, 14 Cl. Ct. 709, 718 (1988) relied upon by the defendant and cited by plaintiff, the court specifically recognized that "a cause of action against the United States" may not be implied, but must be "unequivocally expressed." (quoting United States v. King, 395 U.S. 1, 4 (1969) (internal citation omitted). Only where the statue or regulations at issue impose a fiduciary obligation on the federal government will compensation for damages be sustained. Id. The statues at issue here, 28 U.S.C. §§ 2041 and 2042 which authorize unclaimed funds to be deposited in a depository or with the Treasury, impose no such obligation. Accordingly, as the Fors court expressed: "This court does no have the authority to award to the plaintiff more than [he] is expressly entitled to under the relevant statue and regulations." Id. at 719. See also United States v. Louisiana, 446 U.S. 253, 264-65 (1980) (stating that in the absence of a constitutional requirement, statute, contract or express directive of Congress, interest in not recoverable against the United States. "It follows that the same is true as to any claim of a duty to invest.")

Defendants also argue that the plaintiff fails to state a cause of action based on the undisputed facts. Defendants' argument is well-taken. The United States government cannot be said to have committed an unlawful taking where its possession of plaintiff's unclaimed funds is due to plaintiff's own failure to take possession of those funds. Fors v. United States, 14 Cl.Ct. 709, 720 (1988). In Fors, the family of a soldier declared missing in action in Vietnam and subsequently declared dead by a designated reviewing office, refused to take possession of their son's accumulated military pay pending their contest of the determination of death. Id. at 710. As required by statute, the federal government discontinued paying interest on the accumulated pay 90 days after the determination of death. The family argues that the failure to pay interest thereafter and until the time that the family took possession of the funds, approximately for year later, constituted an unlawful taking in violation of the Fifth Amendment. Id. at 719. As the court pointed out, however there was no Fifth Amendment taking because the family could have received the funds at anytime upon request. Id. "Plaintiff's failure to institute an action to recover those funds... does not mean the plaintiff is entitled to interest that is not otherwise expressly authorized by statute or contract." Id. Mere possession of plaintiff's property cannot be called a taking. Id. at 720.

Plaintiff's failure to file a change of address with the bankruptcy court resulted in the Treasury's temporary possession of plaintiff's unclaimed funds. The United States did not "take" plaintiff's property for public use as a contemplated by the Fifth Amendment. As in Fors, the plaintiff here failed to receive his property due to his own inaction. It cannot now be said that the United States committed an unconstitutional taking by failing to pay interest on unclaimed funds it was obligated by statute to hold for

plaintiff due to his own negligence. Id. at 720.[3] Plaintiff, on the basis of the undisputed facts, fails to state a claim upon which relief can be granted.

CONCLUSION

Accordingly, the Court hereby DENIES defendants' motion to dismiss for lack of subject matter jurisdiction and GRANTS defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

Dated: 4-12-1999 _/s/_____

---

[3] Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) and Schneider v. California Department of Corrections, 151 F.3d 1194 (9th Cir. 1998), the cases on which plaintiff relies, are clearly distinguishable from that before this Court. In those cases, as plaintiff concedes, "interest was withheld pursuant to a statute or law." (Opp. at 6) The seizure cases cited by plaintiff are likewise inapposite. As the Ninth Circuit stated in carving out an exception to the no-interest rule on claims against the United States, "while sovereign immunity will prevent a simple claim for prejudgment interest, the government is not always free to profit from wrongly seized property without recourse by the owner." United States v. $277,000 Currency, 69 F.3d 1491, 1493 (9th Cir. 1995). Here, property was no wrongly seized.

MAXINE M. CHESNEY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FILED

US COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
OCTOBER 23, 2002
JAN HORBALY
CLERK

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED, that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 30, 2002.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: October 23, 2002

cc: Matthew Righetti
Katherine M. Kelly

LEIDER V US, 01-1097
(DCT – 98 – CV – 3766)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-1097

RICHARD LEIDER
Plaintiff-Appellant,

v.

UNITED STATES, UNITED STATES TREASURY DEPARTMENT, and PAUL H. O'NEILL, SECRETARY OF THE TREASURY,
Defendants-Appellees.

Judgment

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

in CASE NO(S). 98-CV-3766

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

DATED: 8-15-2002 /S/_____
Jan Horbaly, Clerk

Issued As A Mandate: 10/30/02

Cost Taxed: $366.80